

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS ALLEN MITCHELL,

Defendant-Appellant.

UNPUBLISHED

June 10, 2003

No. 239305

Kalamazoo Circuit Court

LC No. 01-000348-FC

Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and carjacking, MCL 750.529a. He was sentenced as a second habitual offender, MCL 769.10, to concurrent sentences of 5 to 30 years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court clearly erred when it found that the police showing the victim a surveillance videotape from the Meijer store, recorded on the night of the incident, was not so suggestive that it led to a substantial probability of misidentification and tainted the victim's subsequent identification of defendant as his assailant at a photographic lineup. We disagree.

Michigan courts have recognized that a photographic identification procedure can be so suggestive as to deprive a defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). A trial court's decision to admit an identification is reviewed for clear error. *Hornsby*, *supra* at 466. "The fairness of an identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *Id.* If the identification procedure was impermissibly suggestive, then evidence concerning the identification is inadmissible at trial unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998).

Showing a witness a photographic lineup consisting of only one photo, or a lineup where one person is singled out in some way, is impermissibly suggestive because the witness is tempted to presume the highlighted individual is the perpetrator. *Gray*, *supra* at 111. However, generally, the use of surveillance videos to identify a subject is not impermissibly suggestive

because such films provide a memory-refreshing device, showing the man who actually committed the robbery as opposed to the picture of some possible suspect in the police files. *People v Kurylczyk*, 443 Mich 289, 309-310; 505 NW2d 528 (1993) (internal quotations and citation omitted). The use of such a device could be impermissibly suggestive where it is used to enhance memory. *Id.* at 310.

Here, the victim was shown a surveillance video, which showed the actual events that he had described to the police, and that pictured the man who actually committed the robbery. Also, the victim testified that the surveillance video was not very clear and that he could not ascertain details of his attacker's features from viewing the tape. The victim further insisted that his identification of defendant at the photographic lineup was based solely on his memory, and that he had learned nothing new from viewing the videotape. Therefore, we conclude that the trial court's decision to admit the victim's pretrial identification was not clearly erroneous.

Defendant next argues that the trial court committed error mandating resentencing when it found that the victim's uncoerced driving of his taxi, with defendant seated in the back, from the Meijer store on Gull Road in Kalamazoo County to Leigh Road in Kalamazoo County, where the victim was robbed and his cab stolen, constituted asportation within the meaning of the legislative sentencing guidelines. Defendant contends that, therefore, the trial court erred in scoring fifteen points for offense variable 8 (OV 8). Again, we disagree.

A sentencing court has discretion in determining the number of points to be scored, provided that the evidence on record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.* OV 8 provides that fifteen points should be scored where the victim was "asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense."

As noted both by the sentencing court and by defendant on appeal, the term "asportation," as used in OV 8, is not defined in the sentencing guidelines. Moreover, until very recently, neither this Court nor the Michigan Supreme Court had considered the question of how this term should be interpreted or defined in the context of OV 8. Accordingly, defendant relied on existing case law concerning the interpretation of "asportation" in the context of the offense of kidnapping to support his argument. However, on January 3, 2003, this Court issued its decision in *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003), in which it considered the issue of what constitutes asportation within the context of OV 8.

In *Spanke*, after reviewing the term's use in the context of kidnapping, this Court explicitly found that the term "asportation" as used in the statutory sentencing guidelines, can be accomplished without the employment of force against the victim. *Id.* at 647. Accordingly, in that case, where the victims were moved voluntarily to the defendant's home, as opposed to being forced to travel to the defendant's home, this Court found that the element of asportation had been satisfied. *Id.* at 647-648. Similarly, in this case, although the victim drove willingly and voluntarily to the place where the crime occurred, he did so at defendant's bidding. Therefore, in light of this Court's holding in *Spanke*, we find that the element of asportation was satisfied. Because the evidence adequately supports the assessment of fifteen points for OV 8,

we conclude that the trial court's scoring decision was not an abuse of discretion. Accordingly, defendant is not entitled to a remand for resentencing.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jessica R. Cooper

/s/ Karen M. Fort Hood